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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE, *Petitioner,*

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO., *Respondents.*

JAMES PURDHAM, *Petitioner,*

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT, MARYLAND SHIPBUILDING AND DRYDOCK CO., IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A, pp. 1a-4a) is reported at 338 F. (2d) 464.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED*

Where the District Court and the Court of Appeals both determined that the evidence in the record amply supports the Deputy Commissioner's findings of fact and conclusions of law (App. A, pp. 3a-4a, 7a-8a) in determining that the average weekly wage of the petitioners should be computed under Subsection (c) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, is there any basis for a further review of the decision by this Court?

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Section 901 et seq., hereinafter referred to as the Act, are set forth in the Petition (App. B, pp. 20a-21a).

STATEMENT OF THE CASE

The Deputy Commissioner, after a full hearing, decided that Subsection (c) of Section 910 of the Act should be used in determining the average annual earnings of the petitioners. The basis for his decisions was that employment in the ship repair industry in the Baltimore area is irregular, intermittent and discontinuous and also that it would be unfair and unreasonable, under the particular

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* The Questions presented in the Petition (pp. 2-4) simply indicate the petitioners' disagreement with the Deputy Commissioner's findings of fact, which were sustained by both lower courts, and is an obvious effort to persuade this Court to weigh the evidence independently, which it should not do.

facts involved, to use either Subsection (a) or (b) of the Act in calculating the average wage (App. A, pp. 13a-19a).

The District Court affirmed the awards of the Deputy Commissioner and specifically decided: (1) That, on the record as a whole, the finding that the work was discontinuous and intermittent was adequately, properly and fairly supported by substantial evidence (App. A, p. 7a), and (2) That the actual computation of the petitioners' wages was properly made and that it also was supported by substantial evidence (App. A, p. 8a). The Court of Appeals affirmed the District Court on both grounds.

The following statement of facts will be limited to correction and amplification of the petitioners' statement:

As to Joseph B. White

His seniority date as a chipper and caulker is September 10, 1954 (E's App. 23*). He had been employed by the Company prior to that time, but in 1954 obtained employment elsewhere due to the repeated layoffs and the fact that he wanted a steadier type of employment (E's App. 22, 23, 24). White admitted that the employment situation in 1961, the year preceding the accident in question, was similar to 1954 (E's App. 24). During the 12 month period prior to the accident, as well as during the calendar year 1961, he had not worked elsewhere (E's App. 23). His work was subject to repeated layoffs, which occurred periodically and had been going on for some time (E's App. 24). During the year preceding his injury he had been laid off a total of 11 times (E's App. 24, 25). White's employment was regulated by his seniority date, a fact

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* "E's App." refers to Appellee's appendix in the U.S.C.A. "T's App." refers to Appellants' appendix in the U.S.C.A.

with which he was thoroughly familiar, and he was aware that he was way down on the seniority list (E's App. 24, 25), being 58th out of a total of 92 chippers and caulkers in the department (E's App. 26; T's App. 32-34). In the calendar year 1961 he earned only $1,315.49 (E's App. 23), and was paid for a total of 52 days, including paid holidays and vacation days (E's App. 24). Evidence was introduced showing all the chippers and caulkers who were on seniority for the 12 months prior to the accident (T's App. 32-34), including their seniority dates, actual days worked, vacation and holidays, total days paid and gross wages. This showed that the petitioner actually worked 63 days, was paid for a total of 74 days, and earned $1,793.14. The man immediately above White on the seniority list was Charles Hunt, who earned $1,633.04 and was paid for a total of 65 days. The man immediately below on the seniority list was William McComas, who was paid for a total of 55 days and earned $1,225.06. Of the 92 men on the seniority list in the calendar year 1961 only 27 were paid for over 200 days and 56, among whom was the petitioner, were paid for under 130 days. No one with a seniority date later than March of 1952 was paid for more than 130 days and the median seniority date of the men who were paid for more than 200 days was July of 1943 (E's App. 28-30). Relatively the same situation existed in the year 1960.

As to James Purdham

His seniority date as a shipfitter first class is May 10, 1955 (E's App. 1). He had worked for the Company prior to that time, but did not return when recalled since he had another job at the time and did not think his job at Maryland Shipbuilding would be stable in view of the many and repeated layoffs (E's App. 2).

During the twelve month period prior to the accident, as well as during the calendar year 1961, he had not worked elsewhere (E's App. 3). His work was subject to frequent layoffs and in the year preceding his injury he was laid off and recalled seven times, ranging in duration from one day to nearly three months (E's App. 2, 3). When recalled to work from layoff he was never told how long the job would last, and admitted that he was working on a day to day basis (E's App. 3).

There were many times when no shipfitters were working, other than those with the oldest seniority, and there were numerous layoffs in all departments (E's App. 4, 5). In the calendar year 1961 Purdham earned $3,011.58, was paid for a total of 125 days, including paid holidays and vacation days, and was sixteenth on the seniority list of a total of 40 shipfitters. In the 12 months prior to his accident the petitioner actually worked 136 days, was paid for a total of 149 days, earned $3,725.27 and was eighteenth out of a total of 41 shipfitters. The man immediately above him on the seniority list was Kleppert, who earned $3,873.41, and was paid for a total of 136 days. The man immediately below was Brady, who earned $3,476.76 and was paid for a total of 139 days (E's App. 14, 15).

It is interesting to note that the average annual wage of all the shipfitters on seniority for the year prior to the accident figures out to be $3,369.62. If this figure were used in computing the petitioner's compensation rate it would result in a weekly compensation rate of $43.20. The rate fixed by the Deputy Commissioner was $47.76 per week.

There was also testimony that in the calendar year 1960 Purdham earned $3,787.02.

Of the 41 men on the seniority list in the calendar year 1961 only 13 were paid for over 200 days and 26, among whom was the petitioner, were paid for less than 130 days. No one with a seniority date later than May of 1952 was paid for more than 130 days (E's App. 16-18). Relatively the same situation existed in the year 1960 and in that year no one with a seniority date later than July of 1951 was paid for more than 180 days.

Common to both

The following facts were developed in regard to the irregular and discontinuous nature of employment in the ship repair industry in the Baltimore area.

1. Layoffs in all crafts are a daily problem, varying drastically from day to day (E's App. 6, 12, 20, 22).

2. Shipyard work in this area has been at a very low ebb for several years (E's App. 7).

3. The "bread and butter of the business" is built around short term jobs and the ship repair industry, in this area, operates on a hand to mouth basis insofar as work is concerned (E's App. 7, 13).

4. When the hourly wage force is recalled, it is done on a day to day basis (E's App. 6, 7, 8, 9, 13, 22).

5. There is a considerable amount of mortality or drop-out of employees in the various crafts due primarily to the irregular nature of the employment (E's App. 8, 22).

6. Any one who has worked for the company for any length of time is fully aware of the irregular nature of the work (E's App. 12).

7. Except for a relatively small nucleus of workers, consisting of those with top seniority, there is really no

regular employment in the shipyard (E's App. 9, 10, 12, 21).

8. The ship repair industry is irregular in nature due to the fact that it is subject to the whims of customers, foreign competition, the weather and other factors (E's App. 5, 6, 8, 9, 19, 20, 21).

9. There are great variations of overall employment levels on a month to month basis, and further variations of employment levels between crafts and within a given craft, such as shipfitters and chippers and caulkers (E's App. 6, 19, 20).

There is nothing in the record to show, as contended by the petitioners (p. 6), that the seniority provision in the union contract is typical of that contained in most labor-management agreements.

ARGUMENT

I. There Is No Conflict Between Circuits.

The Decision of the Court of Appeals here is not in conflict with that of any other circuit, and there is no ground for certiorari on this basis. In fact the petitioners concede this point (Pet. pp. 9, 10) and do not attempt to cite or rely upon any conflict between the circuits. The issue presented in this case has been decided by four circuits and all have reached the same result:

Baltimore & O. R. Co. v. Clark, 59 F. 2d 595 (4 Cir. 1932); *O'Hearne v. Maryland Casualty Company*, 177 F. 2d 979 (4 Cir. 1949); *Continental Casualty Co. v. Lawson*, 64 F. 2d 802 (5 Cir. 1933); *Charles Nelson Co. v. Pillsbury*, 48 F. 2d 883, aff'd 56 F. 2d 80 (9 Cir. 1932); *Fireman's Fund Insurance Co. v. Van Steene*, 120 F. 2d 548 (9 Cir. 1941); *California Ship Service Co. v. Pillsbury*, 175 F. 2d 873

(9 Cir. 1949); *Mahony Co. v. Marshall*, 46 F. 2d 539 (W.D. Wash. 1931), aff'd 56 F. 2d 74 (9 Cir. 1932); *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411 (U.S. App. D.C. 1936); *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961).

It is perfectly obvious, as pointed out in the decision of the Court of Appeals (App. A, p. 3), that the law on this subject has been well settled since at least 1932 and that it would be extremely unfair and unreasonable to apply Subsection (b) in a case where the employment is shown to be of an irregular and discontinuous nature.

The petitioners have attempted to misstate the facts by suggesting, in the questions they raise in their petition (p. 3), that only their work was irregular and intermittent whereas the facts show that employment in the entire industry, in the Baltimore area, was of an irregular and discontinuous nature.

II. The Scope of Appellate Review in this Type of Case Is Extremely Narrow.

The petitioners have had not one, but three, days in Court. The Deputy Commissioner carefully considered all of the evidence and wrote a full memorandum explaining his decision (App. A, pp. 13a-19a). The District Court affirmed, also with an opinion (App. A, pp. 5a-8a). The Court of Appeals had no difficulty in unanimously affirming with a Per Curiam opinion (App. A, pp. 1a-4a).

The scope of appellate review, here as well as in the courts below, is extremely narrow. The scope of such review is governed by the Administrative Procedure Act 5 U.S.C.A. Sec. 1001 et seq., and has been considered by this Court in many cases involving different fields of law,

including specifically Workmen's Compensation cases arising under the Longshoremen's and Harbor Workers' Compensation Act. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951); *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Radio Corporation of America v. United States*, 341 U.S. 412, 415 (1951); *F.T.C. v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

These decisions point up that the findings of the administrative body, and the lower courts on review, are not to be disturbed if they are supported by any substantial evidence in the record. They also illustrate the rule, which is a wise one, that certiorari is not granted to review evidence. Indeed this rule is indispensable to the work of the Court. In *O'Leary v. Brown-Pacific-Maxon, Inc., supra,* Justice Frankfurter, in referring to the findings of the Deputy Commissioner, stated:

> "* * * The Standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456. *It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.* * * *"
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> * * * * * *
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> "* * * *We do not mean that the evidence compelled this inference;* we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. * * *." (Emphasis supplied.)

A corollary of this proposition is that any logical inferences or deductions drawn from the evidence by the Deputy Commissioner must be taken as a fact and cannot be rejected by the court even if the evidence permits con-

flicting inferences. This Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said in this regard:

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. *But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because of a belief that the one chosen by the Deputy Commissioner is factually questionable.*
>
> "* * * *It is likewise immaterial that the facts permit the drawing of diverse inference. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.*" (Emphasis supplied.)

III. This Case Does Not Involve a Question of National or Widespread Interest.

Undoubtedly the case is of importance to the petitioners but, contrary to their allegations, there is absolutely nothing in the record to indicate that it is of any public or widespread interest. The facts and the decisions are confined to the ship repair industry in the Baltimore area and more particularly to the wage earning capacity of these two individuals. The petitioners endeavor to persuade the court, despite the complete lack of any such evidence in the record, that this decision will effect the computation of benefits in every similar case throughout the country. It

is readily apparent, from the record and the decisions of both lower courts, that the case was decided on the basis of the particular facts. No hardship will result to any employees working in an industry wherein the employment is not irregular and discontinuous or in any area of the country where ship repair work is regular in nature. This is illustrated by the decision of the Court of Appeals for the Fourth Circuit in *O'Hearne v. Maryland Casualty Company, supra,* involving a shipfitter in the Norfolk area. No evidence was introduced to establish the irregular nature of the industry in that area and as a consequence the decision of the Deputy Commissioner, in using Subsection (b) of the Act to arrive at the claimant's average wage, was affirmed.

By the same token the decision, in the instant case, will not effect in any way those employees whose wage earning capacity, as established by the evidence, is sufficient to allow a different method of computing benefits. In other words those employees, whose wage earning potential is adequate, will not be affected in any way by their position on the so-called seniority list of any labor-management agreement. This strikes down the petitioners' argument (pp. 14-15) that the decision in this case would deprive any employee working under the seniority provisions of a labor-management agreement of the benefit of the formula set forth in Subsection (b) of the Act or of a favorable computation of benefits under Subsection (c). It is only in the situation, such as in this case, where the employment itself is irregular and discontinuous and the employee has a very limited wage earning capacity that the same result would obtain.

There is absolutely nothing in the record, or outside of it, to support the petitioners' allegations (p. 8) that prior

to 1961 claimants situated similarly to the petitioners were invariably allowed the maximum compensation benefits. To the contrary, each and every case in the Fourth Compensation District has always been decided on the basis of the particular facts involved and in many cases the claimants received less than the maximum rate.

The real allegation here is that each and every shipyard worker, or for that matter any other type of employee in any industry, should receive the maximum compensation rate of $70.00 per week when injured simply because his hourly wage rate, when working, would allow him to earn in excess of $105.00 per week on the basis of a 40 hour week. If this were true there would be no reason whatsoever for having Subsection (c) in the Act and the result would be obviously unfair to the employer and completely unreasonable. Congress certainly had this intention in mind when it enacted Subsection (c).

As pointed out by the District Court in its opinion (App. A, 5a, 6a):

> "* * *. Section 910 in its entirety is the Congressional effort to measure the lost earning power occasioned by death or accidental injury under the Act and to project its value in the event that benefits under the Act become payable by reason of accident or death.
>
> "The Congressional policy is fairly well fixed that the projection is to be made on earning power of the last 12 months, depending upon in which of the three categories spelled out in Section 910 a particular employee may fit."
>
> * * * * * *
>
> "* * * it would not be fair, to paraphrase the language of Subsection (c), to use the test of Subsection (b) of Section 910 because the result would be to create a projection of future economic earning capacity way

above any sense of reality or actuality, insofar as it was based upon the foreseeable future as he could see it but, more particularly, based upon a projection of what had taken place in the year immediately preceding the accident."

IV. The Decisions of the Deputy Commissioner and the Two Courts Below Were Correct and This Court Would Have To Affirm Even If Certiorari Were Granted.

(a) *The Record clearly supports the conclusion of the Deputy Commissioner and the Courts below that employment in the ship repair industry, in the Baltimore area, is irregular and discontinuous.*

The Deputy Commissioner in his memorandum sets forth the evidence which he considered in arriving at the conclusion that the employment itself is irregular, discontinuous and intermittent. The District Court and the Court of Appeals had no difficulty in determining that this conclusion was adequately and fairly supported by substantial evidence. In fact the petitioners do not even attempt to argue that the employment is of a regular and continuous nature. They simply contend that because the company did not cease operations entirely and did offer substantially full time employment to a few people, with top seniority, that this in itself required the Commissioner to compute their earnings by using Subsection (b) of the Act. This reasoning would make just about every type of employment regular in nature and certainly was not the Congressional intent. No authorities are cited to support the petitioners' position on this point, and there are none. In fact, all of the authorities are to the contrary.

(b) *Since the employment is irregular and discontinuous, the Deputy Commissioner was bound to use Subsection (c) of the Act in computing the petitioners' average weekly wage.*

The petitioners concede (pp. 9-10) that for 32 years the Courts of Appeals have consistently interpreted the statute in the manner represented by the decision below. However they argue that the rationale of these cases cannot stand the test of logic. Nothing could be more illogical than to hold otherwise. The Court of Appeals for the Fourth Circuit in *Baltimore & O. R. Co. v. Clark, supra,* used the following language in its opinion, at p. 599, to point up why it would be completely illogical to adopt the petitioners' argument on this point:

> "Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. *Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed.*" (Emphasis added.)

A careful analysis of the problem is also given by the Court of Appeals for the Ninth Circuit in *Mahony Co. v. Marshall, supra.*

The petitioners seize upon the word "class" as used in Subsection (b) of the Act and argue that the Deputy Commissioner was wrong in his interpretation of the term

(p. 9). They allege that simply because they are in the general classification, under the union agreement of shipfitters and chippers and caulkers, this in itself puts them in the same "class" as the men with top seniority. Proceeding from this point they conclude that as a consequence, regardless of the nature of the employment itself, Subsection (b) must be used. However this argument flies in the face of all the decisions of the Courts of Appeals.

(c) *Even if the employment were not irregular and discontinuous the Deputy Commissioner still must use Subsection (c) of the Act if it would be unfair and unreasonable to do otherwise.*

It is clear that even if the employment were not irregular and discontinuous this, in itself, does not automatically entitle the petitioners to have their wage computed under Subsection (b). In fact, to the contrary, the statute provides specifically that Subsection (b) should not be used where it would be unfair and unreasonable to do so. It does not state, nor do any cases hold, as the petitioners contend, that Subsection (c) should only be used in those cases where neither the injured employee nor any employees of the same or most similar class work substantially the entire year.

The most recent case involving Section 910 of the Act considered the precise point, *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961). It is interesting to note that this was the only appellate decision, involving Section 910 of the Act, wherein certiorari was applied for and it was denied. The case involved a laborer, employed on a 5 day basis who earned $2.35 per hour and $18.80 per day when he worked. In the year

preceding the accident he worked 180 days and the days he did not work were due either to weather conditions or the unavailability of work. The Deputy Commissioner found as a fact that the employment was of a continuous nature, but still used Subsection (c), rather than (a) or (b), and calculated the average wage by taking the total amount of wages earned by the claimant in the 12 months prior to the accident and dividing by 52. The District Court affirmed the Commissioner and the Court of Appeals upheld the decision on the basis that it was proper to use Subsection (c) where it would be inequitable to compensate the claimant on the basis of a theoretical wage earning capacity, even though the employment itself was of a continuous nature.

The petitioners argue (p. 10) that consideration should be given to the fact that they would have been employed for some time after the date of the accident if the injury had not occurred, although there is no such evidence in the record in the White case. However, the Act does not provide that subsequent earnings should be considered in determining an individual's average wage at the time of the accident and it is readily apparent that such a procedure would not be feasible. The purpose of the Act is to provide speedy benefits to those employees who are injured and it would certainly be impractical and unfair to wait months, after an accident occurs, to ascertain what an individual's earnings might have been before computing his wage.

If Subsection (b) were used in the instant cases, by multiplying the daily wage of $24.00 by 260, which would be the formula, you would arrive at an annual average earnings of $6,240.00 for each employee. This would be patently unfair, unrealistic and unreasonable, since White's

earnings for the calendar year 1961 were $1,315.49 and in the 12 months prior to his accident were $1,793.14. Purdham's earnings for the calendar year 1961 and 1960 were $3,011.58 and $3,787.02 respectively, and in the 12 months prior to the accident were $3,725.27. It is obvious from these figures alone that neither man could reasonably be expected to earn any where near the sum of $6,240 00.

The earnings of the petitioners were not unusual or peculiar but fitted into the general pattern, which was illustrated by the earnings of the men immediately above and below them on the seniority list. The evidence clearly demonstrated that neither of the petitioners had the capacity to earn a wage similar to those men with top seniority and that the employer did not have sufficient work to enable them to do so.

(d) *The method used by the Deputy Commissioner in the computation of the petitioners' average wage under Subsection (c) was proper and within the realm of administrative discretion vested in him.*

After correctly determining to use Subsection (c) the Commissioner used the petitioners' actual wage for the 12 months preceding their accidents and divided by 52 to compute their respective average weekly wage. The petitioners argue (pp. 11-12) that this method of computation was incorrect. Subsection (c) does not require the Commissioner to use the wages earned by the most similarly employed employees, but to have regard to such earnings as a guide in order to determine what the petitioners may have earned in the same employment. Neither Purdham nor White had the capacity in their employment to earn the wage of those higher on the seniority list because of

the seniority rule itself, which was that of their bargaining agent. Therefore, in looking for comparables about the only true comparable that exists with respect to these men, working in such a stratified occupation, is the experience with reference to the employees themselves. As a consequence it would seem that the Deputy Commissioner could have limited his considerations to simply the earnings of the petitioners and not consider any other evidence. However, despite the petitioners' allegation, there is no question about the fact that other evidence of other comparables were offered, received and considered by the Deputy Commissioner (T's App. 30-34).

The petitioners allege (p. 12) that the Deputy Commissioner expressly refused to consider the earnings of other employees in the Purdham case and that there was no reference to the earnings of other chippers and caulkers in the petitioner White's case, in the Commissioner's memorandum. It is obvious that the Commissioner did consider the earnings of the other employees in both cases, as pointed out by the Court of Appeals in its opinion (App. A, p. 3a), but after making the comparison reached the expert conclusion that the use of the petitioners' actual earnings for the previous 12 month period was fair and equitable to all concerned.

The fairness of this conclusion is illustrated by the fact that if you take the earnings of the men immediately above and below the petitioners on the seniority list, who would certainly be the most reasonable comparables, and average them out, the average weekly wage in White's case would be $30.01 rather than $34.48, as used by the Commissioner, and in Purdham's case it would amount to $70.09 rather than the calculated amount of $71.64. In addition, in the

case of petitioner Purdham if you use the earnings of all the men in the seniority unit and averaged them out you would come up with a compensation rate of $43.20 rather than the actual rate used by the Commissioner of $47.76. This demonstrates mathematically that the Deputy Commissioner actually came out with the fairest figure for the employees.

The other significant factor is that additional evidence, concerning the earnings of other men, was received to show that the averages, as a projection of past economic ability to earn money, are not out of line at all, and projecting the earnings of White and Purdham and using them as a basis for their awards does not create any inequity or disparity compared to what would be done if you took the averages of other comparable employees.

The Courts of Appeals, who have considered the question, clearly recognize that the Commissioner has some latitude in deciding exactly how the wage should be calculated under Subsection (c) and have recognized in many cases that there is nothing improper in using the employee's actual earnings in determining his average wage. See *Nelson Co. v. Pillsbury*, 56 F. 2d 80 (9 Cir. 1932); *Continental Casualty Co. v. Lawson*, 64 F. 2d 802 (5 Cir. 1933); *Fireman's Fund Insurance Co. v. Van Steene*, 120 F. 2d 548 (9 Cir. 1941); *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961).

It is obvious, for the reasons set forth above, that on the merits the decisions of the Deputy Commissioner and the two courts below were correct. Therefore the granting of certiorari would be a waste of the Court's time, in the long run, since it would have to affirm on the facts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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